

(1) The bank, as chargee, had been paid in full the outstanding sums due under the charge on 29 July 1991 and therefore ceased to have any legal interest in the land on that date. The beneficial

- interest in the land had passed to the developer who then executed the sale and purchase agreements with the appellants. Once the appellants had paid the full purchase price, the developer held the interest in the apartments as a bare trustee of the appellants. A
- (2) In the present case, the appellants had entered into possession of the two apartments before the purchase. Although under the Torrens system, the register is everything, this is only prima facie. B
The appellants were aware of the charge but were shown proof of payment of the sums owed to the bank before executing the sale and purchase agreements. Furthermore, s 2.02 of the sale and purchase agreements making reference to the charges was deleted and signed by both parties. The delay in presenting the discharge of charge for registration on 23 August 1991 did not therefore affect the equitable rights of the appellants. C
- (3) The prohibitory order should not have been granted as the requirements of s 334 of the National Land Code 1965 had not been complied with. The developer did not hold any interest in land in respect of the apartments when the prohibitory order was obtained and therefore, the appellants had every right to intervene in the proceedings. The appeal was accordingly allowed with costs. D

[Bahasa Malaysia summary

Perayu merupakan pembeli dua unit pangsapuri di dalam satu blok pangsapuri ('harta itu') yang telah dibina di bawah suatu usahasama di antara pemaju harta itu dan Evangelical Lutheran Church ('Gereja itu'). Gereja itu, sebagai pemunya berdaftar tanah di mana harta itu akan didirikan, telah menyempurnakan gadaian pihak ketiga ('gadaian itu') kepada responden ('bank itu') untuk membiayai pemaju itu. E

Apabila kemungkiran berlaku, bank itu telah memohon untuk suatu perintah jualan harta itu di bawah s 256 Kanun Tanah Negara 1965. Bagaimanapun, prosiding tersebut telah diselesaikan di luar mahkamah oleh Gereja itu yang telah membayar bank itu RM1,525,046.80 pada 29 Julai 1991. Pada Ogos 1991, perayu-perayu telah menyempurnakan perjanjian jualbeli dan membayar pemaju harga belian penuh. Kemudiannya, bank itu telah mendapat suatu perintah larangan terhadap dua unit pangsapuri yang dibeli oleh perayu itu, semasa menunggu penjualannya untuk menyelesaikan suatu hutang penghakiman yang lain sebanyak RM763,409.21 yang dihutang oleh pemaju. Perintah larangan itu telah didaftarkan di Pejabat Pendaftaran Hakmilik, Pulau Pinang pada 21 Ogos 1991. Pada 23 Ogos 1991, pelepasan gadaian itu telah diserahkan untuk pendaftaran. F

Perayu telah memfailkan suatu permohonan untuk mencelah prosiding tersebut dan untuk mengetepikan perintah larangan itu atas alasan bahawa sebagai pemunya ekuiti pangsapuri itu, mereka G
H
I

A mempunyai prioriti terhadap perintah larangan itu. Hakim perbicaraan telah menolak permohonan itu dan perayu telah membuat rayuan.

Diputuskan, membenarkan rayuan itu:

- B (1) Bank itu, sebagai pemegang gadaian, telah dibayar sepenuhnya jumlah yang kena dibayar di bawah gadaian itu pada 29 Julai 1991 dan oleh itu tidak lagi mempunyai sebarang kepentingan di dalam tanah itu di sisi undang-undang pada tarikh itu. Kepentingan benefisial di dalam tanah itu telah beralih kepada pemaju yang kemudiannya telah menyempurnakan perjanjian jualbeli dengan perayu. Sebaik sahaja perayu-perayu membayar harga belain penuh, pemaju memegang kepentingan di dalam pangsapuri itu sebagai seorang 'bare trustee' untuk perayu.
- C (2) Di dalam kes ini, perayu telah menghuni dua pangsapuri itu sebelum ia dibeli. Walaupun di bawah sistem Torrens, daftar itu adalah yang terpenting sekali, ini hanyalah prima facie. Perayu sedar akan gadaian itu tetapi telah ditunjukkan bukti bayaran jumlah yang dihutang kepada bank itu sebelum menyempurnakan perjanjian jualbeli itu. Lebih-lebih lagi, s 2.02 perjanjian jualbeli itu yang membuat rujukan kepada gadaian itu telah dipotong dan ditandatangani oleh kedua-dua pihak. Oleh itu, kelengahan dalam menyerahkan pelepasan gadaian itu untuk pendaftaran pada 23 Ogos 1991 tidak menjejaskan hak ekuiti perayu.
- D (3) Perintah larangan itu tidak seharusnya diberikan kerana keperluan s 334 Kanun Tanah Negara 1965 tidak dipatuhi. Pemaju tidak memegang sebarang kepentingan di dalam tanah itu berkenaan dengan pangsapuri tersebut apabila perintah larangan itu diperolehi dan oleh itu, perayu berhak mencelah prosiding itu. Rayuan itu dibenarkan dengan kos.]
- E
- F

Notes

For cases on the concept of bare trusts, see [1989] Mallal's Digest 1132; and [1990] Mallal's Digest 835-836.

G For cases on priority of interests, see [1992] Mallal's Digest 1230-1232.

Cases referred to

- H 1 *Chua Hee Hung & Ors v QBE Supreme Insurance Bhd* [1990] 1 MLJ 480 (folld)
- 2 *Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors* [1974] 2 MLJ 45 (folld)
- 3 *Karuppiah Chettiar v Subramaniam* [1971] 2 MLJ 116 (folld)
- 4 *Teh Bee v K Maruthamuthu* [1977] 2 MLJ 7 (refd)

I Legislation referred to

National Land Code 1965 s 334(1)

Appeal from: Civil Suit No 22-187-90 (High Court, Pulau Pinang) A

Darshan Singh Khaira (Teja Singh & Co) for the appellants.
Hira Singh (Asbir, Hira Singh & Co) for the respondent.

Cur Adv Vult

Harun Hashim SCJ (delivering the judgment of the court): In 1983, the plaintiff ('the bank') granted to the defendant ('the developer') banking facilities exceeding RM1m which were secured by legal charges over two properties known as the Anson Apartments and No 30 Rose Avenue, both in Georgetown, Pulau Pinang. C

Upon default, the bank applied for an order for sale of the two properties under s 256 of the National Land Code 1965. At the same time, the bank also filed a civil claim for recovery of the amount owing under the account secured by the Rose Avenue property. On 8 May 1991, they obtained judgment for RM763,409.21 with further interest and costs.

The order for sale of the Anson Apartments was settled out of court on 29 July 1991. There are 31 units of apartments built by the developer on this property. On 2 August 1991, Toto Wiguna [the second appellant] purchased Apartment No 160/7-2 and on 3 August 1991, Hon Ho Wah purchased Apartment No 160/4-3. They executed sale and purchase agreements and paid 10% of the purchase price. On 8 and 9 August 1991, the purchasers paid the developer the balance of the full purchase price of RM250,000 and RM240,000, respectively. D E

On 14 August 1991, the bank was granted a prohibitory order over the two apartments purchased by Hon and Toto pending their sale to realize the judgment debt of RM763,409.21. The said prohibitory order was registered in the Registry of Titles, Pulau Pinang on 21 August 1991, followed by the registration of the discharge of charge of the Anson Apartments on 23 August 1991. F

On 29 November 1991, Hon and Toto filed an application to intervene in the proceedings and for setting aside the prohibitory order on the ground that as equitable owners of the two apartments, they have priority as against the said prohibitory order. On 30 June 1992, the learned judge dismissed the interveners' application with costs. Hence this appeal. G

The Anson Apartments were built on lands owned by the Evangelical Lutheran Church in Malaysia and Singapore ('the Church'). On 23 March 1981, the Church entered into a principal joint venture agreement with the developer to build the 31 units of apartments on the lands. This was followed by a supplemental agreement on 26 April 1983. The Church, as registered owners of the land, executed third party charges on 29 March 1985 and 20 September 1985, respectively, to the bank to finance the developer. These were the charges, the subject matter of foreclosure proceedings between the bank and the Church in Penang High Court Originating Summons No 24-308-1989 which was settled out of court on 29 July 1991. By letter dated 1 August 1991, the Church wrote to the developer as follows: H I

A Dear Sirs,

Re: Land held as security for UMBC A/c No 2535073532, namely, lands held under Lots 56, 1212, 1213, 1214 and 1215 Bandar Georgetown, DTL, Penang

We refer to the above matter.

B We write to inform you that we have paid a sum of RM1,525,046.80 on 29 July 1991 to UMBC being a full and final payment to redeem the above properties charged to the said UMBC.

Yours faithfully

—Sgd—

C Julius D Paul
Bishop

Encl 1) Letter of acknowledgement of Asbir, Hira Singh & Co
2) Banking slip

D By another letter of the same date, the bishop wrote to the developer as follows:

Dear Sirs,

Re: Letter of disclaimer/waiver of proprietary interest

E We write to irrevocably confirm that our Church being the landowners of Lot No 002125 Sek 12, Bandar Georgetown, Daerah Timur Laut, Pulau Pinang held under Grant No 18852 (formerly known as Lots 56, 1212, 1213, 1214 and 1215, Sek 12 Bandar Georgetown, Daerah Timur Laut, Pulau Pinang) on which the apartment block known as Anson Apartments at Anson Road, Penang is built, we do not have any proprietary interest on the following apartments:

F a) Unit No 160/4-3
b) Unit No 160/7-2.

This letter of confirmation is pursuant to the settlement agreement dated 1 August 1991 between your company and our Church.

Yours faithfully

—Sgd—

G Julius D Paul
Bishop

It will be observed from these two letters that:

H (a) the bank had been paid in full the outstanding sums due under the charge on 29 July 1991; and
(b) the Church disclaimed any proprietary interest in respect of the two apartments, the subject matter of this appeal.

I It follows that the bank, as chargee, ceased to have any legal interest in the lands on 29 July 1991. On that date, the beneficial interest in the land had passed to the developer, who on 2 and 3 August 1991, executed the sale and purchase agreements with the appellants, respectively. The appellants paid the full purchase price on 8 and 9 August 1991 and from then on, the developer held the interest in the two apartments as bare trustees of the

appellants: see *Chua Hee Hung & Ors v QBE Supreme Insurance Bhd*¹ at p 483 where it was held, following *Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors*,² that the vendors, after receipt of the full purchase price and surrender of possession of the lands to the purchasers, are deemed to be bare trustees for the purchasers. *Temenggong Securities*² in turn followed *Karuppiah Chettiar v Subramaniam*.³ In the present case, the appellants had entered into possession of the two apartments before the purchase. It is true that under the Torrens system, the register is everything: *Teh Bee v K Maruthamuthu*⁴ (at p 12) but only prima facie. Here the appellants were aware of the charge but before executing the sale and purchase agreements, they were shown by the developer the bankslips of payment to the bank and the two letters from the Bishop. On top of that, s 2.02 of the sale and purchase agreement making reference to a charge of the land to a bank was deleted and signed by both parties. The delay in presenting the discharge of charge for registration until 23 August 1991 does not therefore affect the equitable rights of the appellants.

The prohibitory order obtained by the bank on the two Anson Apartments was on the basis that they had obtained judgment against the developer in the sum of RM763,409.21 with further interest and costs and that the judgment debtor held an interest in land. A prohibitory order under s 334 of the National Land Code 1965 is limited to cases 'where land or an interest in land held by a judgment-debtor is to be sold in execution proceedings'.

Here, the developer is a judgment debtor and the bank had filed in court an application for an order for sale in respect of the two apartments on 21 November 1991 in execution proceedings but the developer, for the reasons we have stated, did not hold any interest in land in respect of the said apartments on 14 August 1991. As was said in *Karuppiah*³ at p 118:

Want of registration cannot affect his [the purchaser's] equitable rights. Section 206 of the National Land Code, which provides for registration of instruments of dealing in land, contains an express proviso in sub-s (3) that 'nothing in sub-section (1) shall affect the contractual operation of any transaction relating to alienated land or any interest therein'. It is trite law that when the court orders the sale of a judgment debtor's property it cannot sell more than what the judgment debtor himself is entitled to sell.

We hold that the prohibitory order should not have been granted in the instant case as the requirements of s 334 of the National Land Code 1965 have not been complied with. In our judgment, the appellants had every right to intervene in the proceedings.

We accordingly allow the appeal with costs here and below. The order of the High Court dated 30 June 1992 and the prohibitory order dated 14 August 1991 are hereby set aside. The deposit and the security for costs be refunded to the appellants.

Appeal allowed.